No. 87-2048

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO INC.,

Petitioner,

-vs.-

RICKY HASBROUCK, d/b/a
RICK'S TEXACO, et al.,

Respondents.

RESPONDENTS' RESPONSE TO MOTIONS FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE IN SUPPORT OF TEXACO'S PETITION FOR WRIT OF CERTIORARI

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Several trade organizations have moved for leave to file briefs as amici curiae in support of Texaco's Petition for Writ of Certiorari. Respondents respectfully

submit this brief in response to those motions.[1/]

Motions for leave to file amicus briefs in support of petitions for writs of certiorari are not favored. Sup. Ct. R. 36.1. Even when a motion to participate as amicus is made after the Court has granted a certiorari petition, an applicant for amicus curiae status must establish that he will set forth relevant facts or questions of law which have not been or will not be adequately presented by the parties. Sup. Ct. R. 36.3.

Here the Applicants are organizations which have interests identical to those of

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1/ Motions were filed by the Society of Independent Gasoline Marketers of America, the National Association of Convenience Stores, the National Association of Manufacturers, the American Petroleum Institute, the National Association of Texaco Wholesalers, and the Petroleum Marketers Association of America. The moving parties are referred to herein as "Applicants."

the petitioner, Texaco, Inc. They seek to argue the same points which Texaco has already argued in its petition, and have failed to raise any facts or questions of law which have not been adequately presented by Texaco. Indeed, the Applicants' motions and proposed briefs affirmatively demonstrate that the Applicants are not even acquainted with the factual record underlying this case. As a result, the Applicants' views can add little of value to the Court's consideration of Texaco's petition.

All of the Applicants incorrectly assume that this case involves true wholesalers who performed wholesale functions and received a "distributor" discount which had no competitive effect on Plaintiffs or any other retailers. While this characterization of the facts may aid an argument that the court of appeals opinion somehow jeopardizes legitimate wholesale

discounts, it bears little relation to the real facts. The evidence at trial showed clearly that Texaco extended Dompier and Gull a "distributor" discount even though, in the overwhelming number of cases, Dompier and Gull did not in fact function as wholesalers at all but as retailers who sold gasoline at retail in direct competition with Plaintiffs without performing "wholesale" functions, and that even in the limited instances when Dompier resold to other retailers it performed no real distribution functions but instead, with Texaco's knowledge and encouragement, passed the "distributor" discount on to retail stations who competed with Plaintiffs. The only realistic difference between Plaintiffs on the one hand, and Dompier and Gull on the other, was that Dompier and Gull were large purchasers who operated and controlled a large number of retail station outlets.

The evidence also clearly showed that the Dompier and Gull stations enjoyed an enormous competitive advantage over Plaintiffs as a result of their price discount, and that, as a result, Plaintiffs lost sales and profits (and, eventually, their stations) while the Dompier and Gull stations flourished. Texaco's own executives admitted that Dompier and Gull were not performing the functions for which the "distributor" discount was intended, and that the loss of sales by dealers such as Plaintiffs to "distributor" retailers such as Dompier and Gull "can be explained almost entirely by the magnitude of the distributor discount and the hauling allowance." (Ex. 1.) In short, the facts showed exactly the kind of supplier favoritism of large buyers and competitive effects which the Robinson-Patman Act is designed to remedy.

These facts cannot be ignored, since they provide the essential basis for the jury's and the lower court's application of the Robinson-Patman Act to Texaco's pricing in Spokane, Washington. This Court, as all others, must apply the Act to this set of facts, not to a hypothetical set of facts constructed out of ignorance or a desire to support a particular point of view. " . . . [T]his fact-intensive approach is dictated by the statute itself, which . . . calls for an inquiry into whether the effect of a price discrimination has been or 'may be substantially to lessen . . . injure, destroy or prevent competition.'" Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1130 (D.C. Cir. 1988).

The Applicants seem to be concerned with a case which may exist elsewhere, but which does not exist here. This case did not involve legitimate functional

discounts, and nothing in the court of appeals opinion invalidates legitimate functional discounts. To the contrary, the court of appeals expressly recognized that "[m]anufacturers are permitted to use price differentials, commonly known as wholesaler functional discounts, to compensate certain classes of buyers for the distributional services they perform," and that "[f]or this reason, goods may generally be sold to wholesalers at a lower price than that charged to retailers." Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1038-39 (9th Cir. 1987). The true source of Applicants' (and Texaco's) concern is that the court of appeals, like two juries, two district courts and one appellate court before it, found what is obvious from the factual record — that there was sufficient evidence to conclude that in this case the price discrimination in fact affected com-

petition between Plaintiffs and the Dompier and Gull stations.

Thus, Applicants' suggestions that the court of appeals opinion threatens legitimate wholesale discounts, or requires manufacturers to unlawfully discriminate in price between different wholesalers or to control resale prices are simply inapplicable to the case before this Court. For almost 40 years the courts and the Federal Trade Commission have held that the Robinson-Patman Act applies in factual situations such as those presented here, yet wholesale discounts have not disappeared. The court of appeals simply applied well-established precedents, and honored this Court's long-standing insistence that substance rather than suppliers' labels govern Robinson-Patman compliance.

The Applicants represent similar interests and advance similar arguments as

Texaco, and raise no new facts or questions of law which are necessary for consideration of Texaco's petition. The Applicants' own motions demonstrate that they are not informed of the essential facts of this case, and that their concerns do not apply at all to the case before the Court. It is therefore respectfully submitted that the Applicants are not in a position to make any meaningful contribution as amici curiae, and that their motions should be denied.

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Respectfully submitted,

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